PORT KELANG AUTHORITY v. DATIN PADUKA PHANG OI CHOO; TAN SRI DATUK G GNANALINGAM & ORS (THIRD PARTIES)

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY JC
[SUIT NO: 22-1500-2009]
6 JUNE 2016

CIVIL PROCEDURE: *Striking out – Action – Application for – Third party notices – Plaintiff claimed against defendant for acts in her capacity as General Manager for causing loss and damages to organisation – Defendant initiated third party proceedings against members of plaintiff's board seeking contribution in the event plaintiff's claim succeeded – Whether third parties in management team of plaintiff's organisation – Whether third parties joint tortfeasors – Whether third parties had executive functions or powers – Whether third parties owed duty of care to defendant – Whether there was a legal relationship between defendant and third parties – Whether third parties as statutory appointees to plaintiff under s. 2(4) Port Authorities Act 1963 enjoyed statutory protection from personal liability in carrying out statutory obligations – Whether defendant's action against third parties frivolous and obviously unsustainable – Whether ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a) & (c)*

A claim was brought by the Port Klang Authority, the plaintiff ('PKA') against the defendant in her capacity as the General Manager ('GM') and Board Member of PKA. In its claim, the PKA alleged that the defendant had breached her fiduciary duties in causing loss and damages to PKA by, *inter alia*, causing and allowing PKA to enter into an agreement to develop the PKFZ project in a single phase. *Vide* her defence, the defendant pleaded that the alleged breaches complained of by PKA were as a result of the deliberation and collective decision-making process of the Board of PKA, which was ultimately approved by the Minister of Trade and Finance. According to the defendant, the third parties ('TPs'), who were Board Members of the plaintiff pursuant to s. 2 of the Port Authorities Act 1963 ('PAA'), were responsible collectively for all decisions made in respect of the PKFZ project and had full knowledge of all the allegations as contained in the plaintiff's statement of claim. The defendant submitted that each of them owed a fiduciary duty to the plaintiff, duty in law and equity in carrying out their duties as trustees of the plaintiff's assets. It was the defendant's contention that the fact that the TPs owed a duty of care to PKA meant that they too had a duty to act in the best interest of PKA and in the event of their participation in the deliberations, discussions and decisions had contributed to the loss and damages suffered by PKA, the TPs may be held to be joint tortfeasors in the breaches complained by PKA. Pursuant to her line of defence, the defendant initiated third party proceedings against the TPs

A seeking contribution in the event PKA's claim against her was successful. The TPs thus commenced applications against the defendant to strike out the third party notices ('TPNs') pursuant to O. 18 r. 19(1)(a) and/or (c) of the Rules of Court 2012. The TPs contended that the defendant's claim for contribution against them was without basis and obviously unsustainable. B The first TP submitted, *inter alia*, that (i) the defendant's statement of claim against the TPs did not disclose any reasonable cause of action; (ii) as a member appointed to the plaintiff's Board, the first TP was only responsible to the plaintiff, a statutory body and not the defendant; (iii) as a statutory appointee, the first TP was entitled to statutory protection from personal C liability and not liable for any claims, actions and liabilities under s. 3A(1) of the PAA; (iv) the first TP was not a joint tortfeasor in the wrongful acts of the defendant; and (v) there was no nexus or relationship between the defendant and the first TP whether in law or equity that could give rise to a claim for contribution. As for the remaining TPs, their grounds of application were in substance similar to those advanced by the first TP.

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Held (allowing striking out applications):

(1) The claim against the defendant was for acts and decisions/omissions in her capacity as GM of the plaintiff and not for acts/decision and/or omission carried out with members of the plaintiff's Board. The TPs E were not in the management team of the plaintiff's organisation. Hence, they could not be joint tortfeasors with the defendant giving rise to collective liability with the defendant for her acts, decision, omission, etc which constitutes the premise of the plaintiff's claim. Their appointment was strictly under the provisions of the PAA which did not F confer on them any executive functions or powers, which were only conferred on the defendant as the GM. Hence, there was no relationship between the defendant and the TPs giving rise to a right to the former to claim contribution from the TPs. (para 21)

(2) The alleged breaches of the defendant's duties were with respect to her G position as the GM and her fiduciary, contractual and statutory or common law duties as GM. None of the alleged breaches as pleaded against the defendant was in her capacity as Board Member of the plaintiff. The claim by the plaintiff against the defendant was in relation to the personal breaches committed by the defendant in her capacity as H the GM of the plaintiff which did not involve the TPs. The role of the TPs as statutorily appointed Board Members was certainly non-executive whereas it was only the defendant who exercised executive powers and carried out executive functions similar to an executive director. (paras 22, 27 & 31)

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(3) The TPs as members of the plaintiff's Board owed a duty of care only to the plaintiff and none to the defendant. Neither could they be considered as joint tortfeasors to entitle the defendant to seek any contribution and/or indemnity from them for any alleged joint collective responsibility to the plaintiff. No legal relationship was shown by the defendant to exist between her and the TPs supporting the notion contended by her for contribution. As such, the pleaded claim against the TPs should be regarded as totally flawed and baseless. (para 32)

(4) Being a statutory corporation having a perpetual succession and a common seal and being a legal entity which can sue and be sued, the PKA's position was akin to that of a registered company and the Board as its Board of Directors. As in the case of company directors, the TPs as Board Members of PKA did not owe any duty of care or fiduciary duties to their fellow Board Members, including its Chairman. Hence, under the circumstances, the question of breach of duty of care or fiduciary duties would not arise. (para 33)

(5) The TPs as Chairman or members of the plaintiff being appointed by the Yang di-Pertuan Agong or Minister respectively by virtue of s. 2(4) of the PAA are statutory appointees to the plaintiff and as such, enjoyed statutory protection from any personal liability in carrying out their statutory obligations. The defendant's statement of claim did not consist any facts pleaded to show that the TPs acted otherwise than *bona fide* in carrying out the purposes of the Act. The defendant had no reasonable grounds or basis whatsoever to bring in the TPs as parties to seek contribution. It was therefore indisputable that the defendant had no reasonable cause of action against the TPs on her pleaded case. As such, this action against the TPs by the defendant should be considered frivolous and obviously unsustainable in law. (paras 35 & 36)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries (M) Bhd & Anor [2012] 1 LNS 258 CA ***(refd)***

Dingle v. Associated Newspaper [1961] 2 QB 162 ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karam Bunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***

See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(refd)***

Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair @ Ahmad Zubir Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties) [2012] 9 MLJ 464 ***(refd)***

The Koursk [1924] All ER 168 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 10(1)
Port Authorities Act 1963, ss. 2(4), 3A(1)
Rules of Court 2012, O. 18 r. 19(1)(a), (c)

For the plaintiff - Lee Mei Hooi; M/s Skrine
For the defendant - Mavinthra; M/s Thomas Philip
For the 1st third party - P Jeyakumar & Nur Hidayah Saidi; M/s Zahir Jeya & Zainal
For the 2nd to 6th, 8th, 11th to 24th & 26th third parties - Jyotsana Doshi; M/s Abdullah & Zainudin

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JC:

[1] These are applications commenced by the third parties ('TPs') in this case/action against the defendant to strike out the third party notices ('TPNs') pursuant to O. 18 r. 19(1)(a) and/or (c) of the Rules of the Court 2012 ('ROC') as follows:

(i) the first third party's notice of application dated 6 July 2015 ("encl. 83");

(ii) the 4th, 11th, 13th, 14th, 16th, 18th, 19th, 20th, 22nd, 24th and 26th third parties' notice of application dated 3 September 2015 ("encl. 90");

(iii) the 2nd, 8th, 9th, 12th, 15th, 17th and 21st third parties' notice of application dated 30 September 2015 ("encl. 92"); and

(iv) the 3rd, 5th and 6th third parties' notice of application dated 24 November 2015 ("encl. 99").

(to be collectively referred to as the "third parties' applications").

Grounds Of Application

[2] The TPs contended that the defendant's claims for contribution against them were in the factual matrix of this case without basis and obviously unsuitable.

[3] In his application, the first TP stated as follows as to why the writ and statement of claim ('SOC') should be struck out:

(i) it is plain and obvious that the defendant's SOC against the TPs does not disclose any reasonable cause of action;

(ii) the defendant's claim for collective responsibility against the first TP is clearly and obviously unsustainable;

(iii) the first TP is not in any manner whatsoever responsible to the defendant. Nor was he involved in any of the alleged wrongful act committed by the defendant. As a member appointed to the plaintiff board, the first TP is only responsible to the plaintiff, a statutory body and not the defendant;

(iv) as a statutory appointee, the first TP was entitled to statutory protection from personal liability and not liable for any claims, actions and liabilities under s. 3A(1) of the Port Authorities Act 1963 ('PAA') and it was not pleaded by the defendant that the first TP had acted in any manner other than *bona fide* in discharging his statutory duties;

(v) the defence proffered by the defendant in the amended defence did not disclose any involvement by the first TP.

(vi) the first TP was not a joint tortfeasor in the wrongful acts of the defendant as alleged by the plaintiff in the amended SOC nor did the defendant allege any active involvement by the first TP in the purposeful procurement of the torts;

(vii) there was no nexus or relationship between the defendant and the first TP. Whether in law or equity that could give rise to a claim for contribution; and

(viii) in all circumstances, this claim is scandalous, frivolous and/or vexatious or otherwise an abuse of the court process.

[4] As for remaining TPs, their grounds of application are in substance similar to those advanced by the first TP. Their justification for filing the striking out applications have been broadly summarised in the defendant's submission as follows:

(i) the plaintiff's ('PKA's') action was brought against the defendant in her capacity as General Manager of the PKA. As such, any allegation of breaches relates to the defendant's fiduciary duties as General Manager, and not as Board Member of PKA;

(ii) the TPs, as statutory appointees, are afforded statutory protection from any legal action under s. 3A(1) of the Port Authorities Act 1963 ('PAA');

(iii) the TPs did not owe any duty to the defendant, and only owed a duty of care to PKA;

(iv) the TPs were not involved in any of the allegations of breaches, and were not joint tortfeasors; and

(v) there is no relationship between the defendant and the TPs in common law or equity that gives rise to a claim for contribution.

A **Defendant's Case Against The TPs**

[5] In her defence, the defendant pleaded that the alleged breaches complained of by PKA were as a result of the deliberation and collective decision making process of the Board of PKA, and which was ultimately approved by the Minister of Trade and Finance ('MOT and MOF').

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[6] As against the TPs, the defendant pleaded that the TPs were throughout her tenure as the General Manager (GM) and Board Member of PKA, Board Members of PKA.

[7] Pursuant to her line of defence, the defendant initiated third party C proceedings against the TPs seeking contribution in the event PKA's claim against her is successful. Particulars of the allegations against the TPs in the defendant's statement of claim ('SOC') as summarised in her submission are as follows:

(1) The TPs, as Board members of PKA collectively owed a duty of care D (both fiduciary and common law) to PKA.

(2) Pursuant to Circular No. 3 of 1998, which has been adopted by PKA during a Board meeting on 7.12.2000, the TPs as Board members are collectively responsible for all the decisions and activities undertaken by the Board of PKA.

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(3) The TPs were all jointly involved and/or participated in the discussions, deliberations and/or decisions which were made during the Board meetings of PKA. At all material times, the TPs had knowledge of all decisions made and/or to be made by the Board with regards to the PKFZ Project.

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(3.1) In the circumstance, if PKA's claim against the Defendant were to succeed, the TPs may be held contributorily liable pursuant to their involvement in the PKFZ Project.

[8] It was, further, the defendant's contention that the fact that the TPs owed a duty of care to PKA meant that they too had a duty to act in the best G interests of PKA. In the circumstances, in the event their participation (or lack thereof) in the deliberations, discussions and/or decisions had contributed to the loss and damage suffered by PKA (if proven), the TPs may be held to be joint tortfeasors in the breaches complained by PKA.

[9] There was purportedly no necessity for the TP's to owe a duty of care H to the defendant in-so-far as the defendant's claim for contribution is concerned, which is to be distinguished from a claim for indemnity.

[10] In regard to the TPs' allegations *via* their affidavits, the defendant's rebuttals as summarised in her submissions are these:

I PKA's claim was brought against the Defendant in her capacity as the General Manager and Board member of PKA.

(1) PKA's allegations in the Plaintiff's SOC, are related to the decisions which are made at Board level. In the circumstance, the Third Parties who had attended and participated in the deliberations, discussions and/or decisions which took place during the Board meetings of PKA, were jointly involved in the complaints made by PKA.

(2) The particulars of the Third Parties' involvement cannot be determined by way of reference to the Plaintiff's SOC alone. The Plaintiff's SOC must be read together with the Defendant's SOC, in so far as the particularisation of the Third Parties' involvement in the allegations of breaches by PKA is concerned.

Section 3A(1) of the Port Authorities Act 1963 only provides statutory immunity in the event a statutory appointee can show that he/she had exercised his/her duties *bona fide*.

(1) The issue of *bona fides* is not an issue which can be determined by way of affidavit evidence. This will require a full trial wherein the Third Parties' testimonies should be put to scrutiny before determining whether they had acted *bona fide*.

(2) The Third Parties' reliance on this provision of the law at this stage is premature.

The Plaintiff's Claim

[11] The claim was brought by the Port Klang Authority, the plaintiff (PKA), against the defendant in her capacity as in the General Manager ('GM') and Board Member of PKA.

[12] In its claim, the PKA alleged, *inter alia*, that the defendant had breached her fiduciary duties in causing loss and damage to PKA. The allegations, amongst others pertain to:

(i) failure to present and consider all financing options to the Board of PKA before purchasing the land from KDSB;

(ii) failure to provide the Board of PKA with sufficient information pertaining to KDSB's proposal and JPPH's valuation of the land; and

(iii) causing and/or allowing PKA to enter into an agreement to develop the PKFZ Project in a single phase.

The Law On Striking Out Of Pleadings

[13] In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 the Supreme Court lucidly set out the principles applicable to striking out of pleadings. Mohamed Dzaiddin SCJ (later CJ) pronounced that:

The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary

A procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence ...

[14] In the Court of Appeal case of *See Thong & Anor v. Saw Beng Chong* B [2012] 1 LNS 817; [2013] 3 MLJ 235, the Court of Appeal held that for a statement of claim to be struck out summarily, it must be completely hopeless and without any basis. (Ramly Ali JCA as he then was) remarked that:

The statement of claim is not hopeless, baseless or without any C foundation in law. The statement of claim may not be perfect and 'not-so strong' in supporting the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out.

[15] It is trite law that the court's inherent jurisdiction to dismiss an action D summarily should only be exercised in plain and obvious cases. On the case of *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karam Bunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257; [1996] 1 MLJ 309, the Court of Appeal held:

The discretionary power to dismiss an action summarily under O. 18 r. 19 E of the RHC and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases. When a case is argued on the affidavit evidence available, it must become plain and obvious that the case has no chance of success (see p 320I); *Tractors (M) Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 and *Mckay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] F 2 WLR 890 followed.

The Law On A Claim For Contribution

[16] The right of a tortfeasor to contribution as a result of a tort is governed by s. 10(1) of the Civil Law Act 1956 which provides that:

G (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) …

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a H joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. (emphasis added)

I **[17]** In respect of the question of the liability of a joint tortfeasor, the defendant referred to, *inter alia*, the following authorities.

[18] *Dingle v. Associated Newspaper* [1961] 2 QB 162 where it was held: A

> … where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have B or have not a good defence. Those factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. C

[19] *The Koursk* [1924] All ER 168 where it was held:

> … one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': The agent who commits a tort within the scope of his employment for his principal, and the principal the servant who commits a tort in the cause D of his employment and his master; two persons who agree in common action, in the course of and to further which one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another.

Finding E

[20] In principle, the third party notice ('TPN') for contribution by the third parties ('TPs') must be related to the plaintiff's pleaded claim and cause of action against the defendant. The TP claim cannot exist independently and be a separate claim unrelated or without any nexus to the pleaded claim. F

[21] The first and foremost fact of primary importance is that the claim against the defendant ('D') is for acts and or decision/omissions in her capacity as the GM of the plaintiff and not for acts/decision and/or omission carried out with members of the plaintiff's Board. The latter is the basis of D's claim against the present TPs. It cannot be disputed that the TPs are not G in the management team of P's organisation. Hence, they cannot be joint tortfeasors with D giving rise to collective liability with D for her acts, decision, omission etc which constitute the premise of P's claim. Their appointment is strictly under the provisions of the PAA 1963 which does not confer on them any executive functions or powers, which are only conferred on D as the GM. Hence, there is no relationship between the defendant and H the TPs giving rise to a right to the defendant to claim contribution from the TPs.

[22] From the various averments in the plaintiff's SOC against the defendant, it is amply clear that all the alleged breaches of the defendant's I duties are with respect to her position as the General Manager ('GM') and her fiduciary, contractual and statutory or common law duties as GM as set

out in the relevant part of the SOC. It can be seen that none of the alleged breaches as pleaded against the defendant is in her capacity as Board Member of the plaintiff.

[23] In the TPN issued on the defendant's application contribution is claimed from the TPs on this expressly stated ground:

> Defendant claims contribution from you towards the Plaintiff's claim and cost of this action on the grounds that the actions and/or the decision are your decision, the PKA, in which you were Board members at the material time. In that position as a Board member of PKA, you are liable for the claim and costs claimed by the Plaintiff.

[24] Based on the TPN and the plaintiff's SOC, it was, in my view, correctly contended by the 2nd to 6th, 8th, 9th, 11th to 24th and 26th TPs that:

> From this it can be seen that the Third Party Notice is for contribution from the Third Parties for being board members whereas in the Plaintiff's SOC the claim by the Plaintiff is for acts of the Defendant as a General Manager (for her breaches of fiduciary, contractual and common law duties as General Manager). No reference whatsoever is made in the Plaintiff's SOC for decisions made at the board level of the Plaintiff.

[25] According to the defendant's averment, the TPs were Board Members of the plaintiff pursuant to s. 2 of the Port Authorities Act 1963 ('PAA') or that they were representatives of the ministries concerned, but not limited to the Ministry of Finance ('MOF') and Ministry of Trade ('MOT').

[26] The defendant's SOC states expressly that the TPs, (based on the position held by them), are responsible collectively for all decisions made in respect of the PKFZ Project and have full knowledge and/or ought to have full knowledge of all the allegations as contained in the plaintiff's SOC. The defendant also relies on para. 5.4.1 of Circular of 1998 and states that each of the mowed a fiduciary duty to the plaintiff, duty in law and equity (not limited to a duty to act honestly, reasonably and diligently) in carrying out their duties as trustees of the plaintiff's assets.

[27] From the facts pleaded in the plaintiff's SOC, the claim by the plaintiff against the defendant is in relation to the personal breaches committed by the defendant in her capacity as the GM of the plaintiff which does not involve the TPs.

[28] It is beyond dispute that the averments in paras. 84 to 87 of the defendant's statement of claim against the TPs cannot be equated with them being averments of the defendant's wrong or the first third party being a joint tortfeasor in the wrongs alleged against her by the plaintiff.

[29] I agree with the contention of the first TP or this point that:

> At best, they merely suggest that generally the Third Parties were involved and participated in some decision making process. This however falls short of what is required to make the 1st Third Party a joint tortfeasor with the

Defendant. It is trite that there ought to be more than passive presence and participation in the decision making process. In addition there must also exist, the element of active and purposeful procurement of the tort.

[30] On the law relating to entitlement to indemnity and/or contribution, the TPs relied on the ease of *Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair @ Ahmad Zubir Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464 where it was held:

(1) This court found that none of the relationships that gave rise to an indemnity or an obligation to indemnify, which was recognised either in law or in equity, existed between any of the third parties and the first and second defendants. The third parties had never requested the first and second defendants to act or commit any of the wrongs as alleged by the plaintiffs in the main action. Further, the first and second defendants' contention that the right to indemnity arose from some principles of natural justice was also misconceived and not supported by authorities. As such, there was no plausible case made out for any indemnity either as alleged by the first and second defendants or otherwise (see paras 45, 48, 54-55).

(2) Under Malaysian law, the first and second defendants were only entitled to claim a contribution from the third parties towards the satisfaction of any damages that this court may make in favour of the plaintiffs, if the third parties were in law joint tortfeasors with the first and second defendants. In order for the third party to be a joint tortfeasor with the defendants, there should be more than passive presence and participation in the decision making process and there must be the element of active and purposeful procurement of the tort. … Further the third parties in the current proceedings only owed a duty of care to the plaintiffs and not to the first and second defendants.

[31] Similarly, in the instant case, the role of the TPs as statutorily appointed Board Members was certainly non-executive whereas it was only the defendant who exercised executive powers and carried out executive functions similar to an Executive Director.

[32] The TPs as members of the plaintiff's Board owed a duty of care only to the plaintiff and none to the defendant. Neither could they be considered joint tortfeasors to entitle the defendant to seek any contribution and/or indemnity from them for any alleged joint collective responsibility to the plaintiff. No legal relationship was shown by the defendant to exist between her and the TPs supporting the notion contended by her for contribution. As such, the pleaded claim against the TPs should be regarded as totally flawed and baseless.

[33] Being a statutory corporation having a perpetual succession and a common seal and being a legal entity which can sue and be sued, the PKA's position is akin to that of a registered company and the Board as its Board of Directors. As in the case of company directors, the TPs as Board Members of PKA did not owe any duty of care or fiduciary duties to their fellow Board Members, including its Chairman. Hence, under the circumstances, the

question of breach of duty of care or fiduciary duties would not arise. In the same vein, there was no question of the TPs being joint tortfeasors in respect of the decisions made and actions taken by the Board, which were not the subject of the plaintiff's claim in this case. In the Court of Appeal case of *Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries (M) Bhd & Anor* [2012] 1 LNS 258; [2012] 5 MLJ 176 the court held unequivocally on this issue that:

> We venture to say that a director is not liable for the acts of his co-directors of which he has no knowledge and in which he has taken no part as his fellow directors are not his servants or agents to impose liability on him.
>
> The law is quite simple. A director owes no duty to his fellow director. His duties as a director are owed to the company. The duties of a director are amply set out in s. 132 of the Companies Act 1965 and it reflects the common law position.

[34] Lastly, the TPs as members of the PKA Board are conferred statutory protection under s. 3A(1) of the PAA which provides explicitly that:

> 3A. (1) No matter or thing done and no contract of any kind entered into by the authority and no matter or thing done by any member of the authority shall, if the matter or thing was done and the contract entered into *bona fide* for the purposes of carrying out this Act, subject any such member or employee or any other person acting under the direction of the authority personally to any action, liability, claim or demand wheresoever in respect thereof.

[35] It is beyond dispute that the TPs as Chairman or members of the plaintiff authority/Board being appointed by the Yang di-Pertuan Agong or Minister respectively by virtue of s. 2(4) of the Port Authorities Act 1963 are statutory appointees to the plaintiff authority/Board and as such, enjoy statutory protection from any personal liability in carrying out their statutory obligations. The defendant's SOC does not consist any facts pleaded to show that the TPs acted otherwise than *bona fide* in carrying out the purposes of the Act.

Conclusion

[36] On the above premises, based on the pleadings as between the plaintiff and the defendant and the undisputed facts, the claim by the plaintiff as against the defendant is for her breach of fiduciary, contractual and common law duties as the General Manager of the plaintiff. Therefore the defendant has no reasonable grounds or basis whatsoever to bring in the TPs as parties to seek contribution. It is, therefore, indisputable that the defendant has no reasonable cause of action against the TPs on her pleaded case. As such, this action against the TPs by the defendant should be considered frivolous and obviously unsustainable in law.

[37] To sum up, I concur with the principal contentions of the TPs in these applications that:

(1) The Defendant cannot claim any contribution from the Third Parties as the Third Parties do not owe any duty to the Defendant as such there is no basis for the Defendant to make any claim against the Third Parties;

(2) The Plaintiff's claim against the Defendant is confined to the wrongdoings of the Defendant and the Third Parties are not implicated in any of the alleged wrongdoings for them to be held liable for any contribution.

[38] I, accordingly, concluded that the TPN, on the facts and pleadings, is wholly unsustainable without any prospect of success and has to be struck out for being frivolous, vexatious, scandalous and an abuse of the court's process and allowed encls. 83, 90,92 and 99 with costs of RM40,000 to the first TP and RM50,000 to the other TPs.